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IN THE
COURT OF APPEALS OF INDIANA

AARON ROBINSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0603-CV-258
	)	
SEAN LUCAS,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles J. Deiter, Judge
Cause No. 49D08-0503-AD-010718

October 16, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Aaron Robinson ("Stepfather") appeals the trial court's denial of his petition to adopt H.C.L. Stepfather raises three issues, which we consolidate and restate as whether the trial court erred by denying his petition to adopt H.C.L. We affirm.

The relevant facts follow. In 1993, Sean Lucas ("Father") and Kathy (Lucas) Robinson ("Mother") were married, and one child, H.C.L., was born to the marriage on October 24, 2000. Mother and Father separated in May 2002 and were divorced on December 30, 2002. Father was ordered to pay $83.36 per week in child support and maintain health insurance on H.C.L. In February 2003, Mother married Stepfather. Also in February 2003, Father quit his job as an assistant manager at Kinko's and moved to Seattle, Washington, to be near his family. In October 2003, Father returned to Indiana to visit with H.C.L. for her third birthday. Father lost his job in Seattle in June 2004 and remained unemployed through December 2004. In January 2005, Father found another job but soon suffered a heart attack, which required some hospitalization and left him unable to work for a few weeks. Additional facts will be discussed in the analysis as necessary.

On March 21, 2005, Stepfather filed his petition to adopt H.C.L., and Father filed a motion to contest the adoption.[1] After a bench trial, the trial court entered findings of fact and conclusions thereon denying Stepfather's petition to adopt H.C.L. Specifically, the trial court found that "[t]he evidence does not support a finding that for a period of

[1] Neither of these documents was provided in Appellant's Appendix or Appellee's Appendix.

one year [Father] failed to provide support for [H.C.L.] or that this support amounted to merely token support." Appellant's Appendix at 19. Additionally, the trial court found that Father had not abandoned H.C.L. and that "[Stepfather had] not met the burden of providing by clear, convincing and indubitable evidence that [Father] knowingly failed to communicate with [H.C.L.] when able to do so for a period of one year preceding the filing of the petition for adoption." Id. at 21.

The issue is whether the trial court erred by denying Stepfather's petition to adopt H.C.L. When reviewing a trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. Rust v. Lawson, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999), trans. denied. We will not reweigh the evidence but instead will examine the evidence most favorable to the trial court's decision together with reasonable inferences drawn therefrom to determine whether sufficient evidence exists to sustain the decision. Id. The decision of the trial court is presumed to be correct, and it is the appellant's burden to overcome that presumption. Id.

Additionally, the trial court entered findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. In our review, we first consider whether the evidence supports the factual findings. Id. Second, we consider whether the findings support the judgment. Id. "Findings are clearly erroneous only when the record contains no facts to support them

either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, 726 N.E.2d at 1210. We give due regard to the trial court's ability to assess the credibility of witnesses. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

Ind. Code § 31-19-11-1 provides that the trial court "shall grant the petition for adoption and enter an adoption decree" if the court hears evidence and finds, in part, that "proper consent, if consent is necessary, to the adoption has been given." According to Ind. Code § 31-19-9-8:

> (a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:
>
> (1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.
> (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
> (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
> (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.
>
> * * * * *
>
> (b) If a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent.

Stepfather had the "burden of proving that the parent's consent to the adoption [was] unnecessary." Ind. Code § 31-19-10-1.2(a). Stepfather was required to meet this burden by proving by clear and convincing evidence that Father's consent was not required under Ind. Code § 31-19-9-8(a). In re M.A.S., 815 N.E.2d 216, 220 (Ind. Ct. App. 2004).

A. Failure to Communicate.

Stepfather first argues that the trial court's findings regarding Father's communication with H.C.L. are erroneous. Ind. Code § 31-19-9-8(a)(2)(A) provides that a parent's consent to adoption is not required if the parent failed for a period of one year without justifiable cause to communicate significantly with the child when he was able to do so. "One petitioning to adopt without parental consent has the burden of proving both a lack of communication for the statutory period and that the ability for communication during that time period existed." Rust, 714 N.E.2d at 771. "Whether this burden has been met is necessarily dependent upon the facts and circumstances of each particular case, including, for example, the custodial parent's willingness to permit visitation as well as the natural parent's financial and physical means to accomplish his obligations." Id.

"Efforts of a custodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate." Id. "Furthermore, under the present statute, the communication standard has an additional factor." Id. "In order to preserve the consent requirement for adoption, the level of communication with the child must not only be significant, but it also must be more than 'token efforts' on the

part of the parent to communicate with the child." Id. (citing Ind. Code § 31-19-9-8(b)). "The reasonable intent of the statute is to encourage non-custodial parents to maintain communication with their children and to discourage non-custodial parents from visiting their children just often enough to thwart the adoptive parents' efforts to provide a settled environment for the children." Id.

The trial court found the following with respect to Father's communication with H.C.L.:

> 60. The evidence demonstrates that up to and including [Father's] visit to Indianapolis for [H.C.L.'s] third birthday on October 24, 2003, that [Father] maintained regular contact and communication with [Mother and H.C.L.]
> 61. [Stepfather's] telephone records from November of 2003 shows [sic] several telephone contacts and a 17 minute telephone conversation on November 19, 2003.
> 62. In December 2003 [Father] sent [Mother] a web-cam which [Mother] acknowledges was for the express purpose of allowing [Father] to have visual contact with [H.C.L.] on a regular basis because at age 3 her verbal skills were limited.
> 63. The web cam was never installed by [Mother].
> 64. [Mother] testified that [Father's] family acknowledged [H.C.L.'s] birthday, Easter and Christmas in 2004. Indeed, telephone records demonstrate calls to [Mother] and [Stepfather's] telephone from [Father's] area code on Easter, 2004.
> 65. [Father] testified that a number of his telephone calls were not answered and that he left messages on the voice mail. Many of these calls were never returned to [Father]. The Court FINDS that this would account for the number of telephone calls of such short duration.
> 66. [Father] testified that due to his financial circumstances he had to live with his brother and that he was unable to use his cell phone from his brother's residence. As a result, a number of telephone calls were placed by [Father] using a pre-paid telephone calling card. Many of these telephone calls went unanswered and voice mail messages were not returned.

67. The Court FINDS that a reasonable inference that can be drawn from the evidence is that [Father] did attempt to make regular telephone calls using his pre-paid telephone calling card and that these calls could have been reflected in the rather large number of "0000000000" calls contained in [Stepfather's] telephone records. Certainly nothing in the evidence would indicate that the "0000000000" telephone calls reflected in [Stepfather's] telephone records did not include calls placed to [Stepfather's] residence using a pre-paid telephone calling card. In fact, the records indicate a telephone call from "4250000000" was placed on April 11, 2004. Area code "425" is an area code connected to [Father].
68. Considering the burden of proof upon [Stepfather], it cannot be said that he has proven by clear, convincing and indubitable evidence that [Father] did not attempt to communicate with [H.C.L.] for a period of one year preceding the filing of the petition for adoption.
69. While [Stepfather] and [Mother] testified that they sought to encourage [Father's] contact with [H.C.L.], they did not go out of their way to help facilitate that contact by insuring that the web cam that [Father] had purchased and sent was installed in their home. Nor, knowing that [Father] was having a difficult time financially, did they offer to share the cost of travel so that [Father] and [H.C.L.] could have parenting time together. With particular interest is [Stepfather's] Exhibit 3 which are pictures that [H.C.L.] made for [Stepfather]. [Mother] helped [H.C.L.] make these pictures for [Stepfather] and acknowledged that she never helped [H.C.L.] draw pictures to send to [Father].
70. The Court FINDS that a reasonable inference to be drawn from the evidence is that beginning in 2004 [Stepfather] and [Mother] made no real effort to foster [Father's] relationship with [H.C.L.]
71. [Stepfather] has not met the burden of proving by clear, convincing and indubitable evidence that [Father] knowingly failed to communicate with [H.C.L.] when able to do so for a period of one year preceding the filing of the petition for adoption. [Stepfather] and [Mother] have failed to prove they attempted to foster a meaningful relationship between [Father] and [H.C.L.] (note: [Stepfather] was referred to as "daddy" and [Father] was referred to as "Seattle Daddy").

Appellant's Appendix at 20-22.

Stepfather takes issue with several of the trial court's findings. We will first address whether Father had significant communication with H.C.L. during the one-year period in question. We begin by noting that the relevant one-year period appears to be March 21, 2004, through March 21, 2005,[2] when Stepfather filed the petition to adopt.[3] Father testified that his telephone contact with H.C.L. "went downhill" after December 2003. Transcript at 353. According to Father, he "called a couple of time[s], January, February, March, and April and contact just went down at that point . . . ." Id. Father also testified that he called H.C.L. on April 11, 2004, which was Easter, but no one answered the phone, and he was not sure if he left a message. Father later testified that he called "up till May of 2004." Id. at 407. Father lost his job in June 2004 and started a new job in January 2005. He called Mother on December 18, 2004, and left a message that he was employed again and that he would resume paying child support. He and his mother also sent presents to H.C.L. for Christmas 2004.[4] In late January 2005, Father

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[2] Although Stepfather specifies this as the relevant period for support, he does not specify a particular one-year period for the communication issue. Additionally, in his requests for admission and interrogatories to Father, Stepfather identifies the one-year period as November 1, 2003, through October 31, 2004. However, the evidence presented at trial demonstrated that Father had contact with H.C.L. during the fall of 2003 and the winter of 2004. Consequently, we will consider the time period from March 21, 2004, through March 21, 2005.

[3] Because the relevant period is March 21, 2004, through March 21, 2005, when Stepfather filed the petition to adopt, we need not address Stepfather's arguments regarding the Fall 2003 telephone calls. Furthermore, we note that a parent's "conduct after the filing of the petition is wholly irrelevant to the determination of whether the parent failed to significantly communicate with the child for any one year period." In re Subzda, 562 N.E.2d 745, 750 n.3 (Ind. Ct. App. 1990). Thus, to the extent that it considered any of Father's communication and conduct after March 21, 2005, the trial court erred, and we will not consider this evidence on appeal.

[4] Stepfather argues that only Father's conduct is relevant here not his family's conduct. We note that in In re Thomas, 431 N.E.2d 506, 515 (Ind. Ct. App. 1982) (Per Conover, J., with Miller, P.J.,

had a heart attack, and his mother called Mother to advise her of the heart attack. Father had no other communication with H.C.L. until after Stepfather filed the petition to adopt H.C.L.

Although the trial court's findings imply that Father called H.C.L. with a calling card and that the "0000000000" numbers on Stepfather's telephone bill were calls from Father, it is undisputed that Father attempted to contact H.C.L. on April 11, 2004 and that Father did not call H.C.L. from May 2004 to March 2005. Although Father left Mother a message in December 2004 regarding child support and sent H.C.L a Christmas gift in December 2004, these acts cannot be considered "significant communication" with H.C.L. Rather, Father's attempts at communication during this time period amount to token efforts at best. The trial court's finding that Stepfather failed to prove by "clear, convincing and indubitable evidence that [Father] did not attempt to communicate with [H.C.L.] for a period of one year preceding the filing of the petition for adoption" is clearly erroneous.[5]

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concurring in result), this court held that a grandmother's personal visits constituted communication by the father with the children. Regardless, we conclude that no significant communication occurred within the relevant period.

[5] Stepfather argues that the trial court applied the wrong standards when it found "it cannot be said that [Stepfather] has proven by clear, convincing and indubitable evidence that [Father] did not attempt to communicate with [H.C.L.] for a period of one year preceding the filing of the petition for adoption." Appellant's Appendix at 21 (Finding No. 68) (emphasis added). According to Stepfather, attempts at communication are not relevant because the statute requires the parent to "communicate significantly." I.C. § 31-19-9-8(a). However, we have found attempts at communication relevant where the custodial parent thwarted or hampered the communication. See, e.g., In re A.K.S., 713 N.E.2d 896, 899 (Ind. Ct. App. 1999) ("Because the evidence shows that Rita did thwart attempted communications between Shaalan and A.K.S., we hold that the trial court erred by concluding that Shaalan's consent to the adoption was not required under IC 31-19-9-8(a)(2)(A)."), reh'g denied, trans. denied.

Next, we must consider Father's ability for communication during that time period. "Efforts of a custodial parent to hamper or thwart communication between a parent and child are relevant in determining the ability to communicate." In re A.K.S., 713 N.E.2d 896, 899 (Ind. Ct. App. 1999), reh'g denied, trans. denied. The trial court here effectively found that Mother and Stepfather had hampered or thwarted Father's communication with H.C.L. Although Stepfather and Mother argue that they encouraged Father's communication and visitation with H.C.L., including initiating approximately fifty-five calls to Father between November 1, 2003, and August 24, 2005, there was also evidence presented that they hampered Father's communication. Specifically, Father testified that his calls to H.C.L were not answered or returned and that Mother and Stepfather belittled and criticized him when he called. On appeal, we cannot reweigh the evidence or judge the credibility of the witnesses. There is some evidence to support the trial court's findings on this issue, and, thus, the findings regarding Father's ability to communicate with H.C.L. are not clearly erroneous.[6] See, e.g., A.K.S., 713 N.E.2d at

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Stepfather also argues that the trial court applied the wrong standards when it found that Stepfather did not meet "the burden of proving by clear, convincing and indubitable evidence that [Father] knowingly failed to communicate with [H.C.L.]. . . ." Appellant's Appendix at 22 (Finding No. 71) (emphasis added). While we agree that Stepfather was not required to show that Father "knowingly" failed to communicate with H.C.L. under the statute, we need not address this argument further because we have found that Father did not communicate significantly with H.C.L. during the relevant time period.

[6] We acknowledge some concern with the trial court's findings that Stepfather and Mother "did not go out of their way to help facilitate [Father's] contact by insuring that the web cam that [Father] had purchased and sent was installed in their home. Nor, knowing that [Father] was having a difficult time financially, did they offer to share the cost of travel so that [Father] and [H.C.L.] could have parenting time together." Appellant's Appendix at 21-22 (Finding No. 69). Mother testified that she did not have high speed internet necessary to support the web cam, and Father testified that he "was under the assumption" that Mother had high speed internet when he sent the web cam. Transcript at 352. There is no evidence in the record and we can find no support for the assertion that Mother was required to pay for

899 (holding that, because the mother thwarted attempted communications between the father and child, the trial court erred by concluding that the father's consent to the adoption was not required). Although Father failed to communicate significantly with H.C.L. for one year, Stepfather failed to prove by clear and convincing evidence that Father failed for a period of one year without justifiable cause to communicate significantly with H.C.L. when able to do so. See, e.g., In re Augustyniak, 505 N.E.2d 868, 871 (Ind. Ct. App. 1987) (affirming the trial court's denial of an adoption petition where the father's communication attempts were hampered by the mother), reh'g denied, trans. denied. Consequently, the failure to communicate significantly is not a basis for eliminating the need for Father's consent to the adoption.

B. Failure to Support.

Next, Stepfather argues that the trial court's findings regarding Father's failure to support and care for H.C.L. for a period of one year are erroneous. Ind. Code § 31-19-9-8(a)(2)(B) provides that a parent's consent to adoption is not required when, for a period of one year, the parent "knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree." On this issue, the trial court found:

> 52. Introduced as [Stepfather's] Exhibit 2 was a child support history from the Marion County Clerk's Office. This exhibit shows, among other things, that from October 8, 2003 through July 6, 2004 regular child support payments were made from [Father].

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high speed internet service to facilitate Father's communication with H.C.L. or that Mother was required to pay for a portion of Father's travel expenses.

> 53. [Father] became unemployed in June 2004 and remained unemployed until December 2004. [Father] suffered a massive heart attack in January 2005, was hospitalized and unable to work. The child support history from the Marion County Clerk's Office shows that a payment of support was made in January of 2005. The evidence also shows that the Marion County IV-D Prosecutor's Office collected [Father's] 2004 federal tax refund and applied it to the child support obligation. The record also reveals that when [Father] returned to work he began making child support payments including a payment of $1,600 on April 13, 2005.
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> 54. The evidence does not support a finding that for a period of one year [Father] failed to provide support for [H.C.L.] or that this support amounted to merely token support. The question is not whether [Father] was in arrears on his support but whether it can be shown that [Father] failed to provide support for a period of one year and whether this support was merely token support. This the evidence cannot do. [Father] made regular payments up until July 6, 2004. The petition to adopt was filed on March 21, 2005. After suffering through an extensive period of unemployment and experiencing a severe heart attack which left him unable to work for a period of time, [Father] resumed regular payments around the time that the petition for adoption was filed. A failure to support for a period of one year cannot be established from the evidence presented at the trial nor can it be said that the payments made by [Father] were merely token payments.

Appellant's Appendix at 18-19.

Again, the relevant one-year period is March 21, 2004, through March 21, 2005. Stepfather does not dispute that during this period, Father made eight payments of $120.00 each and one payment of $140.30. Rather, Stepfather argues that Father's payments were token amounts of support and that, despite Father's unemployment and health issues during this time period, Father was able to make support payments and failed to do so. Unlike the father in M.A.S., 815 N.E.2d at 220 n.1, who occasionally provided token gifts of groceries, diapers, formula, clothing, presents, and cash, Father

made several child support payments during this one-year period even though he was unemployed for several months and suffered a heart attack. The trial court found that the payments were not token payments, and we cannot say that the trial court is clearly erroneous on this issue. Although he was in arrears, Father did provide some funds for the care and support of H.C.L. during the one-year period. See, e.g., McElvain v. Hite, 800 N.E.2d 947, 950 (Ind. Ct. App. 2003) (holding that the father was unable to pay support after he lost his unemployment benefits). Consequently, the failure to provide support is not a basis for eliminating the need for Father's consent to the adoption.

C. Abandonment.

Stepfather also seems to argue that the trial court's finding regarding abandonment is clearly erroneous. However, Stepfather fails to make a cogent argument on this issue and has waived it. See, e.g., Carter v. Knox County Office of Family & Children, 761 N.E.2d 431, 435 n.3 (Ind. Ct. App. 2001). Waiver notwithstanding, Ind. Code § 31-19-9-8 provides that a parent's consent is not required for adoption if "the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption." The trial court found no evidence to support a finding of abandonment.

Abandonment is defined as "any conduct by the parent which evinces an intent or settled purpose to forgo all parental duties and to relinquish all parental claims to the child." In re Subzda, 562 N.E.2d 745, 748 (Ind. Ct. App. 1990) (quoting In re Adoption of Childers, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982)). "The determination of the

ultimate fact of abandonment should receive a liberal construction so that children who have been denied the benefits of home and parental care may receive those benefits, but not such an interpretation as would destroy the safeguards for the preservation of family relationships." Id. "Mere acquiescence in a child's custody with another parent cannot be construed as an implied relinquishment of the claim to the child." Id. at 749.

The relevant time period here is September 21, 2004, through March 21, 2005. During this six-month period, Father sent Christmas presents to H.C.L., called Mother in December 2004 to inform her that he had a job and would resume child support payments, and made one child support payment. We cannot say that Father's conduct evinces an intent to forgo all parental duties and to relinquish all parental claims, and the trial court's finding regarding abandonment is not clearly erroneous. See, e.g., id. (holding that, although the father's conduct with regard to his parental duties was minimal, the stepfather did not meet his burden of proving by clear, cogent, and indubitable evidence that the father abandoned the child in the six months prior to the date the adoption petition was filed).

In sum, we conclude that the trial court's findings regarding Father's failure to communicate, failure to support, and abandonment are not clearly erroneous. Consequently, Father's consent to the adoption was necessary under Ind. Code § 31-19-9-8. Because we find that the statutory elements under Ind. Code § 31-19-9-8 were not met, we need not address the issue of whether the adoption is in H.C.L.'s best interests.

See, e.g., McElvain, 800 N.E.2d at 950 n.2. The trial court's denial of Stepfather's petition to adopt H.C.L. is not clearly erroneous.

For the foregoing reasons, we affirm the trial court's denial of Stepfather's petition for adoption of H.C.L.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur